OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
v.
P & K COMPANY, LTD.

IBLA 85-485 Decided October 20, 1987

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., denying motion to dismiss and vacating a Notice of Violation. NOV No. 84-3-4-16; Docket No. TU 5-32-R.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Topsoil: Redistribution

Where a fair interpretation of the terms of an approved permit leads to the conclusion that the operator agreed that approximately 24 inches of topsoil were present on the area which would be disturbed, an operator will not be heard to argue after the completion of mining, when it is no longer possible to ascertain with certainty how much topsoil had originally existed, that substantially less than 24 inches were found to exist during the course of its surface mining operations.

APPEARANCES: Marshall C. Stranburg, Esq., Office of Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement; Stephen W. Smith, Esq., Henryetta, Oklahoma, for P & K Company, Ltd.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Office of Surface Mining Reclamation and Enforcement (OSMRE) has appealed from a decision dated February 15, 1985, by Administrative Law Judge John R. Rampton, Jr., denying its motion to dismiss and vacating Notice of Violation (NOV) No. 84-3-4-16, issued to appellee P & K Company, Ltd. (P&K), at its Pollyanna #1 mine (Oklahoma permit 80/81-3036) in Okmulgee County, Oklahoma. The NOV charged a violation of 30 CFR 715.16(a), promulgated under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201, 1265 (1982), in that appellee failed to remove and redistribute A-horizon topsoil to a depth of 24 inches, as required by the terms of its permit. 1/

1/ Soil horizons are defined in 30 CFR 710.5:
"Soil horizons means contrasting layers of soil lying one below the other, parallel or nearly parallel to the land surface. Soil horizons are

On December 17, 1984, appellee filed an application for review of the NOV and a request for a hearing. It stated therein that its initial estimate of the depth of topsoil (24 inches) was in error, and that all available topsoil had been removed and carefully restored. Appellee also applied for temporary relief, requesting that the abatement period be extended until after hearing and formal review.

On February 1, 1985, a hearing was held before Administrative Law Judge Rampton in Tulsa, Oklahoma. At the outset, OSMRE filed a motion to dismiss, contending that appellee was seeking a permit modification after completion of mining operations and that the grant of such relief was beyond the Judge's authority. The Judge deferred ruling on the motion and directed the parties to present their evidence.

OSMRE Inspector James I. Swart testified that he had collected a total of 28 samples on various dates in September and November of 1984. The first sample 2/ was taken from the topsoil stockpile area and showed topsoil throughout its 30-inch depth (Tr. 28). Sample 6S, which was taken off the permit area, went to a depth of 45 inches, and Swart testified that "it all appeared to be of a topsoil" (Tr. 29). Sample 21N was also taken from an area which had not been mined and showed 31 inches of topsoil (Tr. 38). The remaining samples were taken on areas previously disturbed and showed topsoil ranging from zero inches (sample 5S) to 26 inches (sample 8N). Swart testified that, on average, the samples showed 10 inches of topsoil on the disturbed area (Tr. 40). Noting that the mining permit had provided that approximately 24 inches of topsoil would be spread over the pit area, Swart concluded that reclamation had not proceeded in conformity with the permit and issued the NOV.

---

fn.1 (continued)
differentiated on the basis of field characteristics and laboratory data. The three major soil horizons are --

"(a) A horizon. The uppermost layer in the soil profile often called the surface soil. It is the part of the soil in which organic matter is most abundant and where leaching of soluble or suspended particles is the greatest.

"(b) B horizon. The layer immediately beneath the A horizon and often called the subsoil. This middle layer commonly contains more clay, iron, or aluminum than the A or C horizons.

"(c) C horizon. The deepest layer of the soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity."

2/ At the hearing, Swart first testified concerning seven samples taken on September 13, and then related testimony concerning twenty-one additional samples taken on November 4 and 9. While the November samples were consolidated for numbering purposes (running from 1 to 21), the September samples were not, with the result being that there are two sets of samples identified as numbers 1 through 7. In order to avoid confusion, therefore, samples will be referred to as 1S through 7S to identify samples taken in September. Samples taken in November will consist of the arabic number followed by the "N" suffix. The sample referred to in the text would thus be sample 1S.

On cross-examination, Swart described his training concerning soils as consisting of vocational/agricultural courses in high school and additional instruction by the U.S. Department of Agriculture Soil Conservation Service (Tr. 21, 42). Counsel for OSMRE freely conceded that Swart had no expertise in the area of particular soil characteristics and that his knowledge concerning soils was general in nature (Tr. 40-51).

OSMRE soil expert Michael A. Lett generally concurred with Swart's analysis of the amount of topsoil disclosed by the samples taken after reclamation (Tr. 58). He testified, however, that a pre-mining site specific study would have been necessary to determine with certainty how much topsoil was present before the land was disturbed (Tr. 61-62). He noted that, at the time the permit issued, the Oklahoma Department of Mines (ODOM) only required such specificity where prime farmland was involved (Tr. 64). Lett was skeptical of the apparent uniformity of topsoil depths indicated by the drill logs referenced by P&K in its permit (Tr. 65). He also disagreed with Swart's analysis of sample 6S, contending that it contained only 25 inches of verdigris topsoil (Tr. 58-59). He agreed that considerable training and skill might be required to distinguish A-horizon topsoil from subsoil and to interpret soils generally (Tr. 65, 68-69).

P&K's first witness was Okmulgee County soil conservationist Patrick I. Bogart, who testified that the average depth of A-horizon topsoil in the county was 13 to 19 inches (Tr. 78). He conceded the possibility that there might have been 24 inches of topsoil on the permit area prior to mining, but added that "[i]t would not be the normal A-horizon that you would find in Verdigris in Okmulgee County" (Tr. 80).

Lester W. Reed, a retired professor of soil chemistry and agronomy at Oklahoma State University, conducted a soil-sample survey and analysis of the permit property on January 9, 1985. From seven samples taken, Reed concluded that approximately 16 inches of the A-horizon topsoil was now present at the site (Tr. 90).

P&K's vice president, George M. Richardson, testified that one of its employees had taken core samples to determine recoverable reserves of coal on the property (Tr. 117-18). The core samples from these 32 holes later became the drill logs referenced in the permit. Richardson asserted that the individual who conducted the core drilling was simply a heavy equipment operator with no expertise in soil identification (Tr. 118).

A topsoil depth of 0 to 2 feet is given for each core sample (OSMRE Exh. 3, Tr. 25). Paragraph 3.10 of the permit states in part: "Approximately twenty-four (24) inches of topsoil shall be removed and either stockpiled or spread over a backfilled, regraded pit" (OSMRE Exh. 1). In table 2-11 of the permit, topsoil is described as "brown silt loam" and its depth is given as 0 to 2 feet (OSMRE Exh. 2). Describing the topsoil, the permit states elsewhere:

> Verdigris Silt Loam (0 to 1 percent slopes)-This soil has a profile similar to that described for the Verdigris series. It occurs along the larger creeks and is occasionally flooded. Except for strips of trees along the creek banks, most areas have [been] cleared of all but the pecan trees and are now cultivated or used for improved pasture.
>
> The surface layer consists of about 16 inches of grayish-brown or dark grayish-brown loam or silt loam. The subsoil and substratum are clay loam or silty clay loam. The substratum is mottled with brown or yellowish brown.

(Exh. A-A).

Engineering geologist Tom A. Trebonik was involved in the preparation of the permit application for P&K. He stated that no detailed soil study was prepared because such a study would only have been necessary if prime farmland were to be disturbed. He stated that it was not his intent that the permit be interpreted as indicating that the entire area was covered by 24 inches of topsoil. He testified:

> I was relating basically to the drill logs that were provided. The drill logs stated zero to two feet. In providing a description of the general soils of the area, I had noticed that the top soil layer or the A-horizon, as described in the soil survey, indicated, I believe, it was zero to sixteen inches.
>
> And consequently, in the application, we stated approximately twenty-four inches. The twenty-four inches relating to what came off the drill logs. But there was no detailed study done to verify that.

(Tr. 96-97).

Depth of topsoil apparently became an issue as a result of complaints by the surface owner who requested OSMRE to measure the amount of topsoil stockpiled and redistributed. Measurements by OSMRE representative Steve Martin indicated that about 12 inches of stockpiled topsoil "was saved to cover the 103.8 acre permit." Martin characterized the soil survey in the permit as a "general description for Okmulgee County" indicating that less than 16 inches of A-horizon topsoil existed on the permit area prior to disturbance. 3/

P & K's vice president, Richardson, commented on Martin's report: "His report says there were twelve inches based on 103.8 acres within that permit. Within that permit there were 33.2 acres that were undisturbed. And subsequently released by the [Oklahoma State] Department of Mines as undisturbed acreage" (Tr. 120). Richardson stated also that no NOV's were ever issued by ODOM concerning topsoil. He thought that an average of 16 inches of topsoil had been spread over the property (Tr. 123-24).

3/ Martin did not testify at the hearing. His comments are included in P&K's Exhibit B, an OSMRE Mine Site Evaluation Inspection Report, Comments and Recommendations at page 4.

The Judge found from the evidence that approximately 14 to 16 inches of topsoil was on the permit prior to mining and that 14 to 16 inches was replaced thereafter. He concluded that it would be an unreasonable interpretation of the permit to construe it as requiring the placement of 24 inches of topsoil. Instead, he construed the replacement depth as the mean between 0 and 24 inches which is 12 inches. He observed that 30 CFR 715.16 does not require more topsoil to be replaced than was removed and concluded there had been no violation of this regulation.

OSMRE contends that the Judge's findings amount to an unauthorized post-mining modification of appellee's permit. It argues further that appellee's "conduct and actions" (failure to seek timely modification) require that it be held to the 24-inch depth stated in the permit. OSMRE challenges the Judge's use of the 12-inch figure as being unsupported by facts of record. OSMRE concedes that the actual pre-mining topsoil depth was not ascertainable. It contends, however, that in the absence of conclusive proof that a 24-inch depth is not required, P&K must be held to the 24-inch figure even if additional soil must be hauled to the site to achieve this depth.

[1] On appeal, OSMRE again argues that Judge Rampton had no authority to grant the relief sought because it resulted in an unauthorized modification of the permit after mining had been completed. We think that this argument mischaracterizes Judge Rampton's actual holding. Judge Rampton did not purport to amend P&K's permit. Indeed, Judge Rampton indicated at the hearing that he had substantial doubts whether he possessed such authority (Tr. 12-13). Rather, Judge Rampton purported to interpret the permit language in the face of what he considered to be internal inconsistencies. The fact that OSMRE may disagree with such an interpretation does not metamorphose Judge Rampton's holding into an amendment of the permit terms.

It is undisputed, and Judge Rampton so held, that the topsoil had not been replaced to an average depth of 24 inches in the reclaimed area. The real question presented by this appeal is whether Judge Rampton's interpretation of the permit as requiring the replacement depth for topsoil, where the exact amount of the topsoil originally present could not be determined, to be the mean of the 0 to 24 inches indicated in the core drilling results, i.e., 12 inches, is sustainable on a fair review of the record. We do not believe that it is.

Key to the result reached by Judge Rampton was his determination that the figures provided by the core drilling, which indicated that the topsoil depth was invariably 0-2 feet, were meant as a mean. It is impossible to credit this interpretation. Clearly, the core drilling was undertaken to ascertain the extent of the recoverable coal reserves present within the permit area. For this reason, it is not only the depth at which coal would be intersected which was important but also the length of the interval during which coal continued to be present. The fallacy of Judge Rampton's interpretation is readily apparent if one applies the rationale he utilized to the results shown by the core drilling. Thus, Hole 1 was reported as follows:

Depth	Description
0'-2'	Topsoil

2'-37' Clay

37'-40' Coal

These charts from the report cannot logically support a conclusion that the depth figures represented a range of depths encountered. A range cannot be obtained based upon a single sample. Thus as the depth figures relate to a single drill hole, no average depth could be calculated. Average depth is clearly not what the core drill log was intended to show. Rather, these figures show that 3 feet of coal were intersected at an interval commencing 37 feet below the surface and ending 40 feet below the surface. Thus, these figures cannot be taken as average values; they are, instead, indications of specific depths for each interval.

In any event, even if Judge Rampton's interpretation of the core drilling results was viable, this would still not explain the clear statement in the permit that "Approximately twenty-four (24) inches of topsoil shall be removed and either stockpiled or spread over a backfilled, regraded pit" (See Exh. OSM-1). It is simply impossible to interpret the phrase "approximately twenty-four (24) inches" as meaning an average of 12 inches.

The only item in the permit contradicting these rather clear statements is a reference in the description of the proposed mine area soils that "[t]he surface layer consists of about 16 inches of grayish-brown or dark grayish-brown loam or silt loam" (Exh. A-A). In contrast to the specificity of the section relating to topsoil protection, this reference is in the nature of a general description of the types of soil found in the area and the normal nature of their occurrence. It does not purport to be site specific to any area subject to the permit. This generalized reference is inadequate to raise a substantial conflict in the interpretation of the amount of topsoil which P&K has asserted existed and committed to replace. In any event, by no possible theory can this reference be said to support the conclusion that the permit envisioned replacement of 12 inches of topsoil.

We are not unmindful that the permit provision relating to topsoil protection may have been completed without the full advertence of its authors. Nevertheless, P&K submitted the plan as part of its permit application package and, as the constructive author thereof, any ambiguities are properly construed against it. Moreover, counsel for OSMRE makes a cogent argument that it would be unfair to the surface owner to allow P&K, at this late date, to seek to alter the terms of its permit as it relates to this issue.

Clearly, a surface owner has every reason to rely on the approved permit as providing him with assurances that the damage attendant to surface mining would, at a minimum, be ameliorated by the actions agreed to by the operator in obtaining the permit. All of the experts on both sides testified that, after mining, it would be impossible to establish with any degree of certainty the pre-mining topsoil depth within the area mined. To permit P&K to either amend its permit or take refuge in a fanciful ambiguity at this late date, in order to avoid the clear obligations which it had undertaken as a condition of obtaining the permit, would ultimately prove destructive to fair dealings between operators and surface owners and would engender endless litigation.

It may be that P&K will ultimately be required to provide more topsoil than originally existed. Such action is certainly beyond the contemplation of the Act. But, whether in point of fact this eventuality will transpire is now impossible to ascertain. 4/ We are faced with a situation in which the possibility exists that either P&K may be required to do more than the Act intended or the surface owner may obtain less protection than that provided by the Act. Faced with such a Hobson's choice, we feel equity compels the conclusion that we put the risk of loss on the entity that would have been able to protect its interests had it exercised due diligence in the first instance: P&K. Since any problem which may exist was created by P&K's inattention, it properly bears the consequences.

We recognize that there still remains a substantial question as to the amount of topsoil which P&K has already placed on the mined area. Thus, P&K's expert Reed testified that there was 16 inches of topsoil in place, whereas OSMRE contended only an average of 10 inches was present. There was an indication that OSMRE's sampling may have included an old railroad right-of-way, with the result that it understated the amount of topsoil replaced in those areas. We need not, however, resolve this dispute at the present time. Since we are merely directing that P&K place "approximately twenty-four (24) inches" of topsoil on the disturbed areas within its permit, we do not deem it necessary to specify the amount of additional topsoil needed to reach this level. Should problems of interpretation arise in the future, they may be handled at that time. To the extent, however, that Judge Rampton concluded that P&K had fulfilled its obligations by providing an average of 12 inches of topsoil for the reclaimed area, we find that his decision was in error.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Rampton is reversed and NOV No. 84-3-4-16 is reinstated and affirmed.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

R. W. Mullen
Administrative Judge

4/ In this regard, however, we note that Swart's sampling encompassed two areas which had not been disturbed by mining and both showed an excess of 24 inches of topsoil. This certainly lends some credence to the conclusion of the individual who performed the core drilling that 24 inches of topsoil was present in a number of areas within the mining permit.